92-936

Supreme Court, U.S.
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IN THE SUPREME COURT
OF THE UNITED STATES
OCTOBER TERM, 1992

ROBERT KEITH NEELY,

Petitioner.

v.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari
to the United States Court of Appeals
for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI
BRIEF OF PETITIONER

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QUESTION PRESENTED

A. WHETHER A DISTRICT COURT MAY EXERCISE IT'S SUPERVISORY POWER TO DISMISS AN INDICTMENT BECAUSE OF MISCONDUCT BEFORE A JURY WHERE THE MISCONDUCT AMOUNTS TO A VIOLATION OF SPECIFIC RULES ENACTED BY CONGRESS TO ENSURE THE INTEGRITY OF THE GRAND JURY'S FUNCTION AND WHERE A WITNESS CALLED BY THE GOVERNMENT HAS WILFULLY FAILED TO STATE MATERIAL FACTS WHEN CALLED UPON TO ANSWER?

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ROBERT KEITH NEELY,

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Robert Keith Neely petitions for a writ of certiorari to review a judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit reversing and remanding for reinstatement of the indictment by unpublished per curian opinion, is an unpublished opinion dated June 8, 1992 and reproduced at Appendix 1.

JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit was entered June 8, 1992. This Court has jurisdiction pursuant to 28 U.S.C., Section 1254(1).

STATUTES INVOLVED

18 U.S.C. 1621 Perjury generally (Appendix 5)

18 U.S C. 1622 Subordination of perjury (Appendix 6)

18 U.S.C. 1623 False declarations before grand jury or court (Appendix 7)

STATEMENT OF THE CASE

On December 6, 1990, the petitioner was indicted by a federal grand jury sitting in the Western District of Virginia for conspiracy to defraud the United States by interfering with grand jury secrecy, in violation of 18 U.S.C. Section 371; obstruction of justice, in violation of 18 U.S.C. Section 1503; and criminal contempt, in violation of 18 U.S.C. Section 401(3). On April 3, 1991, the district Court (Kiser, J.) dismissed the indictment because of the manner in which the evidence supporting the indictment was presented to the grand jury (App. 10). The government appealed this decision. The United States Court of Appeals for the Fourth Circuit reversed and remanded for reinstatement based on the erroneous belief that the district court dismissed the indictment for the failure of the government to disclose to the grand jury substantial exculpatory evidence in it's possession.

During 1989, the federal grand jury sitting in Roanoke was investigating drug trafficking in Montgomery County, Virginia. Evelyn Cotton was employed as the official court reporter for the grand jury. In May, Cotton heard testimony

that Robert Keith Neely, Michael Giacolone and Jamel Agemy were involved in drug trafficking. Later that year, she heard further testimony concerning drug usage by Neely. She also learned that the federal prosecutor wanted extra time to present evidence to the grand jury involving Neely.

Cotton passed this information to her good friend Shirley Bassett, an alternate court reporter. Cotton gave this information to Bassett because she knew that Bassett was a close friend of Neely and that Bassett had used drugs with Neely on prior occasions. She was concerned that Bassett might be facing trouble herself and that perhaps this information would help her avoid future events involving Neely (Appendix 14). Cotton did not know that Bassett would relay this information to Neely and was shocked when she discovered that Bassett had disclosed the information to him (Appendix 15 - 18). Cotton never spoke with Neely nor did she receive anything of value in exchange for the information.

Bassett was a close personal friend of Neely, a local lawyer, and on occasion had acted as a court reporter for him. Bassett passed the information to Neely because of their long-term friendship.

The government initiated an investigation of the disclosure of this grand jury testimony in August of 1990 after being informed by Giacolone that Neely had advised him that he was obtaining secret grand jury testimony. Neely was Giacolone's regular attorney and had represented him on numerous occasions. Giacolone, who had been indicted on drug trafficking charges, provided this information to the government in an effort to cooperate for a lesser sentence.

The FBI began an investigation of Neely, Cotton and Bassett based on Giacolone's statement. Cotton gave statements to the FBI that she had provided the information to Bassett in an effort to protect her friend. On October 31, 1990, Bassett told the FBI agents that she had passed the information provided by Cotton to Neely because of their long standing relationship. She further advised the agents that Neely had never solicited the information from her. Bassett specifically denied that Neely had ever given her marijuana, or anything else, in exchange for the grand jury information (Appendix 21-25). The FBI agents recorded this information in a FD-302 report which was later provided to the Assistant United States Attorney. A second, more detailed statement was taken from

Bassett on November 8, 1990. Again, she denied receiving anything in exchange for the information and stated that Neely had never solicited the information.

The Assistant United States Attorney prepared indictments against Neely, Cotton and Bassett. On December 6, 1990, the prosecutor presented evidence in support of the indictments to a grand jury sitting in Abingdon, Virginia. Cotton was called as a witness and she recounted her involvement in the offense. Giacolone told the grand jury that Neely had told him he was receiving secret grand jury testimony and that he had connections in the federal system (Appendix 26-27). In an earlier statement to the FBI, Giacolone had stated that he delayed his cooperation with the government because of Neely's connections. However, when questioned before the grand jury as to why he had changed his mind and was now cooperating, Giacolone stated that he had changed his mind due to the advice of his lawyer and the fact that he had found some documents that would support his story so that the prosecutor would now have reason to believe him (Appendix 28). He further advised the grand jury that he had provided marijuana for Neely to give to the court reporter

(Appendix 29-30).

Bassett declined to testify before the grand jury. Special Agent Gerald Fayed was called as a witness. He was asked a specific question concerning Bassett's prior statement, "Q. Can you tell us what the agent found out by interviewing Ms. Bassett and when that happened?" Special Agent Fayed partially summarized for the grand jury the statement that Bassett had given the FBI on October 31, 1990. The agent's testimony followed the written FBI report (FD-302) almost verbatim for a page and a half (Appendix 31-34). However, neither the Assistant United States Attorney nor Fayed ever provided the grand jury with Bassett's statement that Neely had never solicited the information from her. Additionally, they did not advise the grand jury that Bassett had stated that she did not receive marijuana, or anything else, in exchange for the information (Appendix 21-25).

The grand jury returned indictments against Neely, Cotton and Bassett for conspiracy to defraud the United States, obstruction of justice and contempt of court. Cotton and Bassett subsequently pled guilty and were convicted of misdemeanor offenses of criminal contempt under count three

(3) of the indictment for which they were fined.

Neely filed numerous motions in his defense. The court granted a motion for a bill of particulars which was answered by the government with numerous exhibits attached thereto (Appendix 35-55). Neely also filed a motion to dismiss the indictment on numerous grounds including prosecutorial misconduct before the grand jury (Appendix 56-84). On March 22, 1991, the court conducted a hearing on the motion to dismiss. The court dismissed the indictment on the ground that the prosecutor failed to present to the grand jury the evidence of Bassett that she had furnished the information to Neely sua sponte, as it were, on her own ticket, which in no way implicated Neely as having encouraged or aided or conspired to obtain the information (Appendix 85). Further, the court found as a factual matter that there could be no reasonable argument that Bassett's testimony would not be exculpatory (Appendix 86).

On April 3, 1991, the court entered an order dismissing counts one (1), two (2) and three (3) of the indictment on the grounds of prosecutorial misconduct in the way the evidence was presented to the grand jury and, additionally, opined that

the grand jury, if properly instructed, could not have returned a true bill of indictment against Neely as a matter of law based on the evidence of Cotton and Bassett (Appendix 87). The court also dismissed count three (3) on another ground which was not challenged on appeal by the government.

REASONS FOR GRANTING THE WRIT

This Court's decision in United States v. Williams, 60 U.S.L.W. 4348, (1992), held that a court's supervisory power can be used to dismiss an indictment because of misconduct before the grand jury, at least where misconduct amounts to a violation of one of those "few, clear rules which were carefully drafted and approved by this court on the congress to ensure the intergrity of the grand jury's functions." Citing Bank of Novia Scotia v. United States, 487 U.S. 250 (1988) and United States v. Mechanik, 475 U.S. 66, 74 (1986).

In the case now before this court, the government chose to place the statement of Bassett before the grand jury. The Assistant United States Attorney specifically asked Agent Fayed "Can you tell us what that agent found out by

interviewing Ms. Bassett and when this happened?" Special Agent Fayed statement was incomplete with a clear showing of an intent to mislead or misinform the grand jury as to Neely's true actions in the matter. The deletion of the information showing that Neely had never requested any information of Bassett nor that he had ever given her any drugs or anything of value for the information was a conscious use of false or misleading evidence which had to have been known to the government. The trial court found that the deleted information by the agent was material and that the presentation of Bassett's statement was incomplete and improper. In the trial court's mind, this left a serious question as to the fundamental fairness of the entire process of the indictment of Neely. The trial court specifically found in it's order dated April 3, 1991, that all three counts were dismissed because of the manner in which Bassett's statement was presented to the grand jury. For this reason, the trial court was correct in it's ruling in dismissing the indictment as it exercised it's supervisory power based on numerous constitutional and statutory violations.

Standards of behavior for prosecutors and others are set forth in the United States Code. Section 18 U.S.C. 1621

defines the elements of perjury. Section 18 U.S.C. 1622 defines subornation of perjury and 18 U.S.C. 1623 defines perjury before a grand jury. The intentional and wrongful deletion of "what the agent found out by interviewing Ms. Bassett and when it happened" constituted a violation of these statutes. The trial court found that the manner of the presentation of this evidence was improper and dismissed the indictment based on these reasons.

A Court of Appeals for the Fourth Circuit erroneously ruled that the intentionally deleted information was exculpatory and the prosecutor had no duty to present this evidence. The petitioner would agree that this court's ruling in United States v. Williams, supra, procludes the argument of a prosecutor's duty to present exculpatory evidence, however, in this particular case, the government chose to introduce the statement of Bassett and specifically asked the agent "what the agent found out in interviewing Ms. Bassett". The answer to the questions was completely misleading and misinformed the grand jury as to the conduct of the petitioner.

Therefore, the district court was correct in it's ruling in dismissing the indictment for the violation of the various

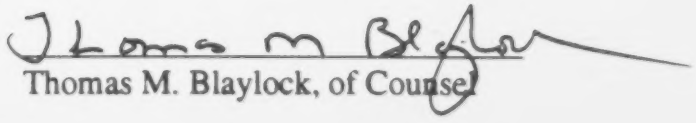
statutes and constitutional concept of fundamental fairness, thereby exercising it's proper supervisory powers.

CONCLUSION

This court should grant Neely's petition for writ of certiorari as the United States Court of Appeals for the Fourth Circuit has decided a federal question in a way that conflicts with the applicable decisions of this court.

Respectfully submitted,

ROBERT KEITH NEELY

By: 
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Appendix

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 91-5031

United States of America
Plaintiff-Appellant,

v.

Robert Keith Neely
Defendant-Appellee.

Appeal from the United States
District Court for the
Western District of Virginia
at Abingdon
Jackson L. Kiser, District Judge
(CR-90-41-R)

Argued: May 8, 1992
Decided: June 8, 1992

Before WILKINSON, Circuit Judge,
CHAPMAN, Senior Circuit Judge,
and HOWARD, United States
District Judge for the
Eastern District of North Carolina,
sitting by designation

Reversed and remanded for reinstatement
of indictment by unpublished per curiam
opinion

COUNSEL

ARGUED: Thomas Ernest Booth, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Appellant. Thomas Marvin Blaylock, Roanoke, Virginia, for Appellee. **ON BRIEF:** E. Montgomery Tucker, United States Attorney, Karen B. Peters, Assistant United States Attorney, Roanoke, Virginia, for Appellant. Max Jenkins, Radford, Virginia, for Appellee.

United States v. Neely

Unpublished opinions are not binding precedent in this circuit. See I.O.P. 36.5 and 36.6.

OPINION

PER CURIAM:

The United States appeals the district court's dismissal of the indictment against Robert Keith Neely. The indictment was returned by a federal grand jury sitting in the Western District of Virginia. It contained three counts charging Neely with conspiracy to defraud the United States by interfering with grand jury secrecy in violation of 18 U.S.C. Section 371, obstruction of justice in violation of 18 U.S.C. Section 1503, and criminal contempt in violation of 18 U.S.C. Section

401(3).

On April 3, 1990, the district court dismissed the indictment on the grounds of prosecutorial misconduct in failing "to present to the grand jury the evidence of Shirley Bassett," and found that "a grand jury, properly instructed as to the legal significance of these statements, could not, as a matter of law, return a true bill."

The district court erred in dismissing the indictment. In Costello v. United States, 350 U.S. 359 (1956), the court held that a defendant may not challenge an indictment on the ground that it is not supported by adequate or competent evidence, which was one of the grounds used by the district court in dismissing the Neely indictment. The other ground was identified as prosecutorial misconduct in failing to present the evidence of Shirley Bassett, which would have been exculpatory. This is an inadequate ground under the very recent decision of United States v. Williams, 60 U.S.L.W. 4348 (1992), which held that a district court may not dismiss an otherwise valid indictment because the government failed to disclose to the grand jury substantial exculpatory evidence in its possession. There has been no showing that the Neely

indictment was otherwise invalid, and therefore the order of dismissal must be reversed and the indictment reinstated.

REVERSED AND REMANDED FOR

REINSTATEMENT OF INDICTMENT.

18 U.S.C. 1621. Perjury generally.

Whoever--

(1) having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true; or

(2) in any declaration, certificate, verification, or statement under penalty or perjury as permitted under section 1746 of title 28, United States Code, willfully subscribes as true any material matter which he does not believe to be true;

is guilty of perjury and shall, except as otherwise expressly provided by law, be fined not more than $2,000 or imprisoned not more than five years, or both. This section is applicable whether the statement or subscription is made within or without the United States.

18 U.S.C. 1622. Subornation of perjury.

Whoever procures another to commit any perjury is guilty of subornation of perjury, and shall be fined not more than $2,000 or imprisoned nor more than five years, or both.

18 U.S.C. Section 1623. False declarations before grand jury or court.

(a) Whoever under oath (or in any declaration, certificate, verification, or statement under penalty of perjury as permitted under section 1746 of title 28, United States Code) in any proceeding before or ancillary to any court or grand jury of the United States knowingly makes any false material declaration or makes or uses any other information, including any book, paper, document, record, recording, or other material, knowing the same to contain any false material declaration, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

(b) This section is applicable whether the conduct occurred within or without the United States.

(c) An indictment or information for violation of this section alleging that, in any proceedings before or ancillary to any court or grand jury of the United States, the defendant under oath has knowingly made two or more declarations, which are inconsistent to the degree that one of them is necessarily false, need not specify which declaration is false if--

(1) each declaration was material to the point in

question, and

(2) each declaration was made within the period of the statue of limitations for the offense charged under this section.

In any prosecution under this section, the falsity of a declaration set forth in the indictment or information shall be established sufficient for conviction by proof that the defendant while under oath made irreconcilably contradictory declarations material to the point in question in any proceeding before or ancillary to any court or grand jury. It shall be a defence to an indictment or information made pursuant to the first sentence of this subsection that the defendant at the time he made each declaration believed the declaration was true.

(d) Where, in the same continuous court or grand jury proceeding in which a declaration is made, the person making the declaration admits such declaration to be false, such admission shall bar prosecution under this section if, at the time the admission is made, the declaration has not substantially affected the proceeding, or it has not become manifest that such falsity has been or will be exposed.

(e) Proof beyond a reasonable doubt under this section

is sufficient for conviction. It shall not be necessary that such proof be made by any particular number of witnesses or by documentary or other type of evidence.

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF VIRGINIA

ROANOKE DIVISION

UNITED STATES OF AMERICA,

Plaintiff

ROBERT KEITH NEELY,

Defendant

Crim. Action No. 90-00041-R

ORDER

Defendant has moved the Court to dismiss Counts 1, 2, and 3 of the indictment on the grounds of (1) prosecutorial misconduct, and (2) that Count 3 of the indictment was erroneous as a matter of law because defendant was not a person within the purview of Fed. R. Crim. Proc. 6(e)(2) upon whom the obligation of secrecy is imposed.

The Court grants the defendant's motions and Counts 1, 2, and 3 of the indictment are hereby dismissed.

All three counts are dismissed because of the manner in which the evidence supporting the indictment was presented to

the grand jury. Specifically, the evidence which is the keystone of the government's case and above which it cannot rise is that of the witnesses Bassett and Cotton. Both witnesses specifically disclaim that defendant Neely, in any way, participated in causing the grand jury secrecy to be breached. Both state that Neely's participation was simply to receive information that Cotton, on her own initiative, conveyed to Neely. A grand jury, properly instructed as to the legal significance of these statements, could not, as a matter of law, return a true bill.

Additionally, the Court finds that Count 3 of the indictment is defective because it is contrary to the specific dictates of Fed. R. Crim. Proc. 6(e), which states that no obligation of secrecy shall be imposed on any person, except in accordance with the rule, and defendant Neely is not one of the persons upon whom the obligation of secrecy is imposed by the rule.

Additional reasons for granting defendant's motion to dismiss were set forth orally at a hearing on March 22, 1991, and appear at pp. 7-11 of the transcript of that hearing.

The Clerk is directed to send a certified copy of this

Order to all counsel of record.

ENTER this 3rd day of April, 1991.

/s/ Jackson L. Kiser
U. S. District Judge

Q. Do you have any -- excuse me -- do you have any way of determining whether or not you spent the night with Shirley at her house that night?

A. Yes, I do. I went back and looked in my calendar, I have mileage recorded in my calendar that reflects that I stayed overnight in Roanoke. I know that if I stayed overnight in Roanoke, I did stay at Shirley's, and I did stay at Shirley's on May 19th, the date of Regan's testimony, and other dates since then.

Q. So it could've been -- you could've told her as early as May 19th?

A. Yes.

Q. Was this -- this conversation took place at her home?

A. Yes.

Q. Okay, why were you talking to Shirley about Keith Neely?

A. Because I knew from previous conversations with Shirley that her and Keith Neely were good friends and I also knew that she had partaken of drugs with

Keith Neely before, and I was concerned that if they, the government, Grand Jury, whoever, were looking at Keith Neely, that she might herself be facing some trouble, and that's why I told her, was hoping that she might be able to at least avoid future events involving him.....

... pass this information directly on to Keith Neely?

A. Absolutely not.

Q. Did she promise you that she wouldn't?

A. I don't know that she specifically said words like, "I won't tell Keith," but the context in which we had that discussion clearly left me with the impression that it was a discussion between us only and that it would go no further.

Q. But based on her relationship with Keith, if you'd thought about it a little harder you might've guessed that she would've told him?

A. I don't think so. I have the feeling now that her relationship with Keith was little more involved than I thought it was at the time. I think I could say that if I'd known more about their relationship then I might've suspected she would tell them but, no, at that point I didn't really think that she would. I didn't think their relationship was that close.

Q. You didn't have any idea that they'd had a girlfriend-boyfriend relationship?

A. No. I still don't know that, I suspect it now, but no, I didn't.

Q. You felt that she simply worked for him as a court reporter?

....

Q. Okay, did this cause --request cause you to be curious and to speculate about what might be going to happen to Keith Neely?

A. Yes, it did.

Q. What was your conclusion from that request?

A. That some action was going to be taken in regards to Keith.

Q. And did you tell Shirley about the transcript and your speculation?

A. Yes, I did.

Q. Did you have any idea that Shirley was communicating that information to Keith Neely?

A. No, I didn't.

Q. Did you give her that information on the same understanding that you'd told her other things?

A. Yes.

Q. Did there come a time on or about September 12th, 1990, when Morgan Scott was in the Grand Jury, I believe, with Rusty Fitzgerald on some drug cases?

A. I think that's the date.

Q. And did Morgan Scott mention to the Grand Jury in your presence that they might need a day of Grand Jury time for a Keith Neely investigation?

A. Yes, he did.

Q. And this day was supposed to be sometime in the

....

.... knowledge was though that that was a violation of the law?

A. Yes, it was.

Q. And you have no doubt that Ms. Bassett knew that that was a violation of the law?

A. I have no doubt. And I'm still shocked that she did actually tell him all this.

Q. As a court reporter, you were well aware that by discussing outside the Grand Jury what has happened inside the Grand Jury, it can have the effect of affecting ongoing investigations?

A. Yes.

Q. It could cause witnesses to disappear, documents to disappear, that sort of thing?

A. Yes.

Q. In the worst case scenario, bad things --

A. Witnesses die.

Q. -- bad things happen?

A. Yes.

MS. PETERS: Do you all have any

questions of Ms. Cotton?

GRAND JUROR: You sorry for what you done?

WITNESS: Yes, absolutely.

BY MS. PETERS:

Q. I believe you've already resigned your job as court

....

FD-302 (Rev.3-10-82)

THIS FD-302 IS BEING "FAXED" TO YOU. THE ORIGINAL FD-302 IS BEING SENT THROUGH THE MAIL UNDER PINK SHEET.

THANKS. . . . /S/ NITA

11-01-90

Date of transcription 11-01-90

SHIRLEY STANLEY BASSETT, date of birth April 18, 1957, Social Security Account Number 229-94-8463, was interviewed at her residence, 3167 Olde Oak Drive, Roanoke, Virginia, home telephone number 703/981-0864, and advised as follows:

BASSETT advised that she has had a long-standing personal and professional relationship with Attorney KEITH NEELY, which has existed for approximately 10 years. During this time frame, she has handled various court reporting assignments for NEELY. On occasion, she furnished her court reporter services, to NEELY, on a gratis basis, in court cases in which NEELY was personally involved.

BASSETT has been acquainted with EVELYN COTTON since she and COTTON attended Court Report

School approximately 10 years ago. She is aware that COTTON is the Primary Court Reporter employed by the UNITED STATES ATTORNEY'S OFFICE (USAO), Western District of Virginia (WDVA), in connection with Federal Grand Jury (FGJ) proceedings in that district. BASSETT advised that she is the alternate Court Reporter employed by the USAO, WDVA.

BASSETT stated that it is customary for COTTON comes to Roanoke for FGJ proceedings. She specifically stated that during the summer of 1989, COTTON related to her (BASSETT) information that had been revealed in FGJ testimony, which COTTON had been privy to based on her employment as the FGJ Court Reporter. This information pertained to NEELY and a person known as MIKE GIACOLONE. Specifically, COTTON revealed to BASSETT that she (COTTON) had heard testimony given in the FGJ by a person identified as "JIMMY." This testimony pertained to a drug investigation in which NEELY and GIACOLONE were subjects of investigation, and more specifically, related to the use of NEELY'S vehicle, further described as an RX-7 with license tags "NEELY," in a drug deal.

BASSETT advised that because of her long-standing relationship with NEELY, she passed along the information which COTTON had revealed to her, as indicated above.

Investigation on 10/31/90 at Roanoke, Virginia, File # Richmond 12F-248 by SAs John P. Butler and Timothy Paul Burke (JPB/jzg) Date dictated 11/1/90.

This document contains neither recommendations or conclusions of the FBI. It is the property of the FBI and is loaned to your agency; it and its contents are not to be distributed outside your agency.

BASSETT advised that recently, perhaps a month or two ago, another incident occurred involving FGJ testimony. On this occasion, COTTON had come to BASSETT's residence to spend the night. COTTON was in Roanoke to act as Court Reporter for the FGJ proceedings. When COTTON arrived at BASSETT's home, BASSETT inquired of COTTON if there was anything new on NEELY. At that point, COTTON advised that she (COTTON) had heard that the USAO for the WDVA, specifically Assistant United States Attorney KAREN B. PETERS, was attempting to scheduled FGJ time, possibly as much as a whole day, to proceed against NEELY.

BASSETT stated that it is her recollection that she related this information to NEELY, in person, at NEELY's office shortly after COTTON had told her of the information. She further stated that she (BASSETT) was not sure that this

particular piece of information had come from FGJ proceedings. She stated that it was possible that COTTON had overheard clerical personnel of the USAO discussing this matter.

BASSETT stated that in previous contacts with NEELY, he (NEELY) had given her the impression that his telephone line might be tapped and that she should be circumspect in what was discussed on the telephone with him.

BASSETT indicated that NEELY never solicited information from her, and she furnished the information to NEELY because of their long-standing relationship.

BASSETT specifically denied that NEELY had ever given her marijuana, or anything else, in exchange for the information concerning FGJ proceedings.

BASSETT indicated that COTTON was aware of her long-standing relationship with NEELY, and she assumed that COTTON was aware that information that she (COTTON) was providing to BASSETT was being passed along to NEELY.

Q. Okay, can you tell us what he told you about any connection he may have had to the Grand Jury?

A. Well, he just told he know this alternate court appointed stenographer that lived in Roanoke and this other -- the original court reporter that lived in Lynchburg would come and stay with her, and then they would discuss what happened in the Grand Jury and he would get the information back and he'd relate it to me.

Q. Did he also imply to you in some fashion that the Chief Federal District Judge Jim Turk was somehow protecting him?

A. I don't know if he actually said that, but I knew that Jimmy and Keith -- Jimmy Turk, which is a lawyer in Radford, were good friends and did some things together, and he just said that he would hate to see, Judge Turk, said he would hate to see Keith get in any trouble.

Q. Did that cause you to believe that Judge Turk might be somehow looking after Keith Neely?

A. In a way.

Q. Did Keith Neely also tell you something about the U.S. Attorney being interested in looking after him?

A. He implied it.

Q. In what way?

A. That they -- they all went to same college and had some kind of comradery, and other judge went to the same college and that's in -- just went from one -- one mouth to the next.

Q. Would this be kind of bragging about his connections?

A. Well, I though they were true, I didn't know if he was bragging or not, but I was pretty -- I was convinced anyway. Especially when I found out that what was said in the Grand Jury was true.

Q. Having heard about the Grand Jury information that he had, what effect did that have on your willingness to cooperate?

A. What do you mean?

Q. Did knowing what Keith Neely knew or could find out from the Grand Jury keep you from being willing to cooperate and give evidence against Keith Neely?

A. Yeah.

Q. Did there come a time when you changed your mind and you decided that you would be willing to give evidence against Keith Neely in connection with money laundering charges?

A. This past July.

Q. What changed your mind this past July?

A. Oh, just a number of things. Just I guess my lawyer helped a little bit, and I finally got these documents

that we -- we had some land up in Claytor Lake together, and I finally got those documents and the deeds so I could bring them forth to you all.

Q. Did you tell me at one time that you didn't think that we would believe you unless you had the

documents in your hand to show somebody?

A. Well, I don't think -- I don't know if we really discussed that or not, but I was just -- I knew I didn't have anything for you to believe me for.

Q. Can you tell us who Jim Regan was? Or is?

A. He was a person that I'd known for quite some years that I used to give some cocaine and Marijuana to.

Q. And he in turn resold it?

A. Yes, he did.

Q. You have him cocaine and Marijuana after you yourself acquired a source for it through Jamel Agemy?

A. That's true.

Q. That, I believe, was in the fall of 1987 that Agemy said he could get all of these drugs?

A. That's about the time.

Q. And Agemy in fact was able to bring larger quantities of dope than you'd ever had access to?

A. That's true.

Q. And then you sold a great deal of it to Jim Regan in

wasn't interested if she was or not, it didn't matter to me.

Q. Did he ever tell you that he was giving the court reporter something in return for the information that she was giving him?

A. Well, I's giving him some pot to give to her.

Q. By pot you mean Marijuana?

A. Yes.

Q. Okay, how often did you give Keith Neely Marijuana that he told you was for the court reporter?

A. Probably three or four different times.

Q. In what quantities?

A. Anywhere from half an ounce to an ounce.

Q. What was the value of this Marijuana?

A. It's high quality, it's worth couple hundred dollars an ounce.

Q. And by high quality, you mean high potency?

A. Right.

Q. Were you using this Marijuana yourself at the time?

A. No.

Q. So your information about its quality came from other people?

A. Well, he -- he told me they like it, that they -- they wanted more of it, so I suppose that they got some and tried it out. Said --

Q. But she wasn't the usual person who sat in Roanoke and took notes?

A. Right.

Q. Can you tell us what the agent found out by interviewing Mrs. Bassett and when that happened?

A. They interviewed her on October 31st, 1990. She informed the agents that she'd known Keith Neely for approximately ten years, and during that time, she'd done various court reporting assignments for Keith Neely. She has known -- she had known Evelyn Cotton for -- who is the regular court reporter, since both of them -- both of them had attended court

reporting school about ten years before. She had known that Evelyn Cotton was the primary court reporter for the Federal Grand Jury in the Western District of Virginia normally held in Roanoke, Virginia. And, she admitted to being the alternate court reporter. She said that normally Evelyn Cotton came to the Federal Grand Jury proceedings in Roanoke, inasmuch as Evelyn Cotton lived in Lynchburg. So normally when Evelyn would come to the Grand Jury and would have to stay for more than one day, she would stay with Shirley Bassett and her husband. It was during these times that Evelyn Cotton would give her

information about what was occurring in the Grand Jury. She specifically recalled a situation that happened approximately in the summer of 1989 when Evelyn Cotton related to her information that had just occurred in the Federal Grand Jury about Keith Neely and Mike Giacolone. And at that time, Bassett recollected that the person testifying about these two individuals was a guy named Jimmy, she couldn't quite recall the last

name at that time. The investigation that Jimmy was testifying about was a drug investigation involving Keith Neely and Mike Giacolone, and it was some mention of Keith Neely's vehicle being used in a drug transaction. She said that after she had been passed on this information by Evelyn Cotton, she gave the information to Keith Neely because he was a friend of hers. Then she said about a month or two ago before the interview, she received some other information from Evelyn Cotton. Bassett at that time asked Evelyn Cotton if she had heard anything further about Keith Neely and that Evelyn had found out through her dealings with the U.S. Attorney's Office in the Grand Jury that

Assistant United States Attorney Karen Peters was attempting to schedule some Grand Jury time, possibly as much as a day or two or whole day of Grand Jury time regarding the activities of Keith Neely. Bassett then recollated at some --recollected that at

some point after she received this information from Cotton she relayed it to Keith Neely, and that this occurred at Keith Neely's office. That's basically a summary of it.

Q. Let me run some dates by you while you're here, as they appear in the indictment. Is it your best recollection that Jim Regan did testify in the Grand Jury in the Western District of Virginia at Roanoke on or about May 19th, 1989?

A. Yes, ma'm.

Q. Is it your best recollection that Beverly Wallace testified in the Federal Grand Jury at Roanoke on or about November 15th, 1989?

A. Yes, ma'm.

Q. And is it also your best information that it was on or about August 7th, 1990, that Debra Mayhew, my secretary in the U.S. Attorney's Office, called Evelyn Cotton to ask for another transcript of Beverly Wallace's testimony?

A. Yes.

....

IN THE

UNITED STATES DISTRICT COURT

FOR THE

WESTERN DISTRICT OF VIRGINIA

ROANOKE DIVISION

Criminal No. 90-00041

UNITED STATES OF AMERICA

v.

ROBERT KEITH NEELY

UNITED STATES BILL OF PARTICULARS

The United States declares the following as a particularization of the proof of the Indictment in the above matter:

1. Question: . What information does the Government refer to in paragraph 3 that the Government contends was disclosed to co-defendant Shirley Stanley Bassett concerning drug related

activities by Jamel Agemy, Michael Giacolone and Robert Keith Neely.

ANSWER: HOW INFORMATION FROM THE GRAND JURY TESTIMONY OF JAMES REGAN ABOUT DRUG ACTIVITIES BY MICHAEL GIACOLONE, KEITH NEELY AND JAMEL AGEMY WAS DISCLOSED TO SHIRLEY BASSETT.[1]

According to Shirley Bassett, she was told by Evelyn Cotton, the Grand Jury court reporter, on a few occasions over a period of time that the federal Grand Jury was investigating Keith Neely, Michael Giacolone and Jamel Agemy and that the overall investigation involved drugs. She recalled being told in possibly the Summer, 1989, about the testimony of a Jimmy Regan, who mentioned Neely. She recalls being told about Regan's description of football shaped drugs. She recalls being told that Neely's vehicle, with a signature plate "Neely", was

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[1] This particularization is based on statements by Shirley Bassett made on October 31, 1990 and on November 8, 1990, attached hereto as Exhibits. It should be noted that on neither occasion was the witness given a copy of the James Regan transcript of testimony or any other transcripted testimony with which to refresh her recollection. It may be that the transcripts would refresh further details that they could not remember when they were asked, cold, for their recollections.

used in a drug delivery by Michael Giacolone. See Shirley Bassett's statements attached hereto as Exhibits.

The United States evidence would be that James Regan testified in the Grand Jury on May 19, 1989, that the disclosures of his testimony occurred on or after May 19, 1989, and prior to August 15, 1989, the date Steve Wimmer went into the Grand Jury. These specific dates are established by transcripts and Wimmer's statement. Shirley Bassett can only remember approximate dates.

2. Question: What specific information does the Government refer to when, in paragraph 3 (a), it states that Robert Keith Neely disclosed "some of them to Michael Giacolone". Set forth the exact time of day and location that the alleged information was disclosed by the co-defendant Robert Keith Neely to Michael Giacolone.

ANSWER: WHAT INFORMATION FROM THE MAY 19, 1991 GRAND JURY WAS DISCLOSED BY

KEITH NEELY TO MICHAEL GIACOLONE.[2]

According to Michael Giacolone, possibly in May 1989, possibly within a couple days of the Grand Jury statements, and certainly prior to his own indictment (November 8, 1989), Keith Neely told him that his name (Giacolone's) and Jamel Agemy's had come up in the federal Grad Jury through the testimony of Jim Regan, in connection with "drug dealings in the Montgomery County area". Neely did not mention that his, Neely's own name had also come up.

The government's proof would be that both Giacolone and Neely knew what the drug dealing issue was about, inasmuch as both knew that Giacolone and Agemy had been dealing drugs. Giacolone had been giving Neely quantities of drugs from that drug trade. Moreover, Neely had been laundering, borrowing, or essentially stealing Giacolone's drug money, being aware of it's source.

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[2]This particularization is based on a statement given by Michael Giacolone on August 30, 1990 and on Grand Jury testimony given on December 6, 1990. On neither occasion was he given transcripts of Grand Jury testimony to refresh his recollection. It may be that reviewing Grand Jury transcripts would refresh details of communications that he has since forgotten.

3. Question: Set forth all acts and specific requests, if any, made by defendant, Robert Keith Neely, on or about May 19, 1989 which were allegedly made and said by co-defendant Robert Keith Neely unto Shirley Stanley Bassett to obtain the alleged information on or about May 19, 1989.

ANSWER: NEELY MADE NO PRIOR SPECIFIC REQUEST FOR GRAND JURY INFORMATION ON OR ABOUT MAY 19, 1989

Keith Neely did not specifically request Grand Jury information from Shirley Bassett on or about May 19, 1989. Nowhere in the Indictment or proof is it charged that Neely made a specific request prior to May 19, 1989. Rather it is charged that Neely fostered a relationship with Shirley Bassett over a period from September 1988 through approximately January 1990 by engaging in illegal drug crimes with her and distributing to her free marijuana. This illegal conduct placed her in Neely's debt and linked her to him. Neely was apparently proud of this conquest and told Giacolone, Steven Wimmer and Don Kimbler about her, prior to the Grand Jury

disclosures set out in the Indictment. This indicates a course of conduct of prior cultivation of Bassett for the purpose of obtaining information. Thus, because of the prior cultivation, Shirley Bassett voluntarily provided the Grand Jury information to her companion in illegal drug usage, Keith Neely. On one occasion, at an uncertain date different from May 19, 1989, Neely did ask Bassett to tell him about Grand Jury information by saying, "Let me know if you hear anything else". See Shirley Bassett's statements, attached hereto as Exhibits.

4. Question: What was the exact information provided by Evelyn Marie Cotton to Shirley Stanley Bassett concerning the alleged testimony of Beverly Wallace on November 15, 1989. Also, set forth the exact discussion that occurred between co-defendant Evelyn Marie Cotton and Shirley Stanley Bassett.

ANSWER: WHAT INFORMATION WAS PROVIDED BY EVELYN COTTON TO SHIRLEY BASSETT CONCERNING INFORMANT BEVERLY

WALLACE'S TESTIMONY OF NOVEMBER 15, 1989[3]

Evelyn Cotton told Shirley Bassett that a female informant had testified in the Grand Jury about using drugs of some sort with Keith Neely. It was discussed that the drug use was being videotaped for law enforcement purposes. The two women discussed whether the room was dark at the time and how a drug sample was obtained by the informant. See Evelyn Cotton's statement on October 31, 1990 and Grand Jury testimony on December 6, 1990, attached hereto as exhibits. (These statements in full have been previously supplied to counsel). See also Shirley Bassett's statement of November 9, 1990, attached hereto as exhibits.

5. Question: Please set forth all acts, their times and dates, that the Grand Jury was impeded or the investigation of the Federal Bureau of Investigation was impeded by the alleged disclosure made and set forth in Count Two.

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[3]The face of the Beverly Wallace Grand Jury transcript says that it was taken on November 16, 1989. That would be the government's proof of the true date the testimony was given. The date appearing in the Indictment is incorrect by one day.

ANSWER: HOW THE FEDERAL GRAND JURY WAS IMPEDED BY KEITH NEELY'S DISCLOSURE OF THE INVESTIGATIONS IN THE GRAND JURY TO A TARGET.

A. The proper functioning of the Grand Jury depends upon the secret procedures being strictly maintained by its Grand Jury reporter. Any time that there is any violation of that duty of secrecy by the Grand Jury reporter, then the system fails to work as it is designed to, and is thus crippled in its functions. If a faucet drips it is not functioning properly, even though it still works after a fashion. Keith Neely, an attorney and officer of this Court, repeatedly received information, with no effort to stop it, and, indeed, encouraged it with marijuana, knowing that it came from the official Grand Jury reporter, a prohibited source. This conduct by Neely contributed to (aided and abetted) the continuing malfunctioning of the machinery of the Grand Jury.

Thus, on each occasion on which Neely knowingly received information stolen from the Grand Jury by the Court Reporter he violated its functioning. He received information on or about the following dates, as is set out in Count One of

the Indictment.[4]

1. After May 19, 1989 (and prior to August 15, 1989).

2. On or about November 15, 1989.

3. On or about August 7, 1990.

B. Secondly, Neely's disclosure to Giacolone that Giacolone's name was part of Jim Regan's testimony in connection with drug dealing alerted Giacolone that he was a target and would likely be indicted. Secrecy of the Grand Jury is specifically designed to keep the identity of witnesses secret and the names of persons under investigation secret prior to their indictment. Thus, the very statement to Giacolone that he was a target and who the witness was, violated and impeded two specific historical purposes of the Grand Jury.

C. Thirdly, moreover, the disclosure to Giacolone had the additional effect of causing Giacolone to believe that Neely had a "federal fix" and that he, Giacolone, would not be safe in cooperating with the Grand Jury, against Neely, because this would immediately be known to Neely through the leak Neely was fostering and feeding with drugs. Giacolone's awareness of

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[4]See, infra, section 7, concerning disclosures not listed in Count One as overt acts.

Neely's Grand Jury access caused him to lie to federal investigators on or about March 6, 1990 concerning his knowledge of Neely's laundering of drug profits. See Giacolone's March 6, 1990 statement, attached hereto as an exhibit.

Despite all reasonable inducements specifically provided by law to encourage cooperation by defendants, [See Title 18, U.S.C., Section 3353(e)], Giacolone was delayed for months in his willingness to cooperate with federal agents, and to ultimately testify in the Grand Jury. Giacolone would finally testify in the Grand Jury only after Neely's source, the Grand Jury court reporter was removed. Giacolone could have reasonably been expected to start to cooperate no later than the date of his guilty plea, March 6, 1990. However, he could not be persuaded to give information against Neely until August 16, 1990, and did not testify in a Grand Jury about Neely's money laundering until December 6, 1990.

6. Question: Set forth the exact time of day, location, conversation surrounding same, and any acts committed by Robert Keith Neely concerning the allegations concerning the allegations [sic] set forth in

Court Three.

ANSWER: HOW KEITH NEELY AIDED AND ABETTED THE DISCLOSURE OF SECRET GRAND JURY INFORMATION BY THE GRAND JURY COURT REPORTER ON OR ABOUT MAY 19, 1989.

On or about May 19, 1989, probably within a few days, and prior to August 15, 1989, Evelyn Cotton, official Grand Jury Court Reporter, a person governed by the secrecy requirement Rule 6(e), Federal Rules of Criminal Procedure, violated Rule 6(e) by telling her friend, Shirley Bassett the name of a Grand Jury witness and the names of persons who were being discussed as targets of the Grand Jury investigation, Neely, Giacolone and Agemy.

Both Cotton and her friend, Shirley Bassett, knew that one purpose of Grand Jury secrecy as applied to the Court Reporter, was to prevent names of witnesses and names of those discussed in the Grand Jury from being published to those being discussed in the Grand Jury. Both knew that any disclosure at all created the risks that witnesses would be exposed and targets warned.

Nonetheless, Shirley Bassett aided and abetted and

caused Evelyn Cotton to disclose the secret information to precisely one of the persons not intended to receive it, the target, Neely. Even if Shirley Bassett could not articulate the word target, she felt that Neely was in trouble. Neely knew that he was a target due to his drug activities with Giacolone and others, and Neely was a target in the view of the law enforcement persons assisting the Grand Jury.

Next, Neely did the same thing. He further aided and abetted the Court Reporter to disclose the name of the witness and the targets to another target, Giacolone. He did this within a few days of the May 19, 1989 Grand Jury testimony by Regan. But for Neely, Giacolone would not have known that he was a target of the Grand Jury prior to his Indictment some six months later.

The manner in which Neely aided and abetted the Court Reporter's continuing breach of her duty of secrecy was simply by informing Giacolone that Regan had brought up his name (Giacolone's) in the Grand Jury drug investigation. See 2. above. See Giacolone's statement of August 30, 1990 and Grand Jury Testimony of December 6, 1990, attached hereto as an Exhibit. This was accomplished in much the same way

that one who receives stolen property from someone who got it from the thief, can pass it on to yet another person who knows that it is stolen. Each person in the chain aids and abets the other in passing on the stolen property to its ultimate recipient.

7.Question: To what overt acts does the Government refer to when it states "among others" in the opening statement of paragraph 3 of the indictment.

ANSWER: APART FROM THOSE LISTED IN THE INDICTMENT, WHAT "OVERT ACTS" KEITH NEELY ENGAGED IN FURTHERANCE OF THIS CONSPIRACY TO DEFRAUD THE GOVERNMENT OF ITS PROPER FUNCTIONING BY DEPRIVING THE GRAND JURY PROCESS AND ITS WITNESSES OF THE PROTECTION OF SECRECY BY THE COURT REPORTER, AND BY DEPRIVING FEDERAL INVESTIGATORS OF PROMPT AND TRUTHFUL WITNESSES.[5]

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[5]It should be noted that only one overt act is required to prove a conspiracy. The United States objects to the provision of its factual case under the guise of "other overt acts".

Keith Neely engaged in the following acts to affect the secret and efficient conduct of the grand Jury and of witnesses and potential witnesses before it:

(1) In about December, 1986, at the time of the Caballero trial, Neely bragged to his close friend and drug confederate, Don Kimbler, that he had valuable access to the Grand Jury through the alternate Court Reporter, whom he pointed out to Kimbler. See Don Kimbler Grand Jury testimony on December 6, 1990, attached as an Exhibit hereto. Neely told Kimbler that this source would be useful "if anybody ever started investigating us". Kimbler felt that Neely was "keeping close track of all investigations of himself and on his friends maybe ..." [Keith Neely's friends, the drug dealers Jimmy Pappas and Keith Snyder, were, in fact being investigated by the Grand Jury prior to each of their deaths.]

Kimbler recalled that during his relationship with Neely from 1986 through 1990 he had heard some Grand Jury information from Neely about witness Jerry DeHart [who, in fact, testified in the Grand Jury on October 21, 1987 prior to his death] that had come from the Court Reporter. Kimbler was asked by Neely to investigate the informant and witness

DeHart.

(2) Neely also gave Shirley Bassett cocaine, in addition to marijuana, to cement their close relationship. See Shirley Bassett statements, attached hereto as an Exhibit.

(3) Neely told Steve Wimmer several times about his access to the Grand Jury. This had the effect of cooling Wimmer's desire to testify fully before the Grand Jury on August 15, 1989. See Steve Wimmer statement summary, previously filed with the Court under seal.

(4) Neely bragged to Michael Giacolone that the "privileged information" that he was getting out of the Grand Jury was "worth a lot", about "fifty thousand dollars". See Michael Giacolone's Grand Jury transcript of December 6, 1990, attached hereto as an exhibit.

(5) In about September, 1988, Neely solicited from Giacolone five pounds of marijuana, given to him on credit, which he later paid for. Neely later told Giacolone the court reporter liked this pot.

(6) In about May or June, 1989, Giacolone again gave Neely marijuana which Neely said he was giving to the alternate Court Reporter his Grand Jury source.

(7) Just prior to Giacolone's indictment on November 8, 1989, Giacolone and Neely agreed to "stick together", in the belief that both were about to be indicted.

(8) Michael Giacolone and numerous others were indicted on November 8, 1989 (Neely was not indicted). On or about November 20, 1989, Max Jenkins picked up the voluntary open file discovery from the United States Attorney's Office in connection with his representation of Bill Abell, a sub-dealer for Giacolone and Agemy. Max Jenkins then immediately turned over Jim Regan's Grand Jury transcript to his friend Keith Neely, who was named in it. Keith Neely used the transcript to point out to Michael Giacolone that he, again, had an inside source for advance Grand Jury materials. This impressed upon Giacolone Neely's seemingly powerful connections, as Giacolone's own lawyer had not yet received his set of discovery and Neely already had it. Either at that time, or subsequently, Max Jenkins turned over the Neely the full set of discovery that he received through his representation of Abell, in violation of the understanding with the United States Attorney's Office and the Court's verbal affirmation of that understanding. This conduct reflected a continuing motive

and intent to obtain Grand Jury materials in an unauthorized and unlawful manner and for self-serving purposes.

Michael Giacolone "believed" that James C. Turk, Jr. was the source of the contraband Regan transcript. See Giacolone Grand Jury transcript, attached hereto as an exhibit. James C. Turk, Jr. states, however, that, according to Neely at the time, the transcript came from Max Jenkins. See Jimmy Turk's statement summary, previously filed with the Court under seal as part of the witness list.

(9) To buttress his claim of inside sources and powerful connections, Neely would imply to Giacolone that others in the federal system, such as the United States Attorney and Chief Judge were associated with him. See Giacolone Grand Jury transcript of December 6, 1990, attached hereto as an exhibit.

8. Question: To what is the Government referring to when it says Evelyn Marie Cotton disclosed these matters to Shirley Stanley Bassett in paragraph 3(b).

ANSWER: HOW SHIRLEY BASSETT DISCLOSED BEVERLY WALLACE'S NOVEMBER 16, 1989 TESTIMONY TO KEITH NEELY.

According to Shirley Bassett, she heard from Evelyn Cotton that a female informant had testified in the Grand Jury [November 16, 1989] about using drugs with Keith Neely on videotape.

Shirley Bassett made a statement to the FBI on November 9, 1990, which was summarized by the agent as follows:

"After receiving the above-mentioned information from Cotton regarding this female informant's testimony, Bassett supplied this information to Neely. This information was supplied to Neely in person, possibly in Christiansburg, Virginia."

Shirley Bassett's statements have been previously provided to counsel and are attached hereto as Exhibits. That is to say, at the very least, Shirley Bassett identified a Grand Jury witness to Neely, and confirmed to him that he was a target of the Grand Jury as to this videotaped incident.

9. Question: Please set forth all acts, their times and dates, that the Grand Jury was impeded or the investigation of the Federal Bureau of Investigation was impeded by the alleged disclosure made and set forth in Count Two.

ANSWER: HOW THE GRAND JURY INVESTIGATION AND THE FEDERAL INVESTIGATION WAS IMPEDED OR DELAYED BY THE DISCLOSURES BY NEELY TO GIACOLONE ON OR AFTER MAY 19, 1989.

This issue is discussed in (5) above. See also Michael Giacolone's statements, Donald Kimbler's statements, attached hereto as Exhibits and Steve Wimmer's statement summary, previously filed with the Court in the witness list/summary.

10. Question: Set forth the exact disclosure of all secret testimony before the Grand Jury allegedly given to Robert Keith Neely.

ANSWER: WHAT GRAND JURY INFORMATION AND SECRET TESTIMONY WAS DISCLOSED TO KEITH NEELY.

(1) 1987. According to Don Kimbler, Neely was told that Jerry DeHart was an informant/Grand Jury witness. [DeHart was]. See Section 7 above and Don Kimbler's Grand Jury testimony of December 6, 1989.

(2) 1988. According to Don Kimbler, Neely was possibly told about his friends Jimmy Pappas and Keith Snyder

being investigated in the Grand Jury. [They were]. See Don Kimbler transcript of December 6, 1989. See (7) above.

(3) May 19, 1989 - August 15, 1989. According to Shirley Bassett, Neely was told that Jim Regan had testified in the Grand Jury about a drug investigation, that Neely's name came up, as well as Giacolone's and Agemy's. See Section 1. above, and see Shirley Bassett and Evelyn Cotton statements.

(4) After November 16, 1989, Neely was told that a female informant [Beverly Wallace] had testified about using drugs with him on videotape.

(5) After August 7, 1989, and probably on August 22, 1989 [See Shirley Bassett's statement of January 21, 1991], Neely called Shirley Bassett from a pay phone at her request, to receive information about the United States Attorney's Office requesting a re-transcription of the Beverly Wallace November 16, 1989 Grand Jury testimony.

(6) On September 24, 1990 Shirley Bassett told Keith Neely that Karen Peters had requested an entire day of Grand Jury time that might involve Keith Neely.

Respectfully submitted,

E. MONTGOMERY TUCKER

United States Attorney

/s/ Karen B. Peters

Assistant United States Attorney

CERTIFICATE

I hereby certify that a true and correct copy of the foregoing United States Bill of Particulars has been faxed (without Exhibits) on March 8, 1991 to Edward M. Jasie, Fax No. 703/951-9153, and also mailed to Edward M. Jasie, P. O. Box 174, Suite A, 209 North Main Street, Blacksburg, Virginia 24063-0174 on this 8th day of March, 1991.

/s/ Karen B. Peters

Assistant United States Attorney

IN THE
UNITED STATES DISTRICT COURT
FOR THE
WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

CRIMINAL NUMBER - 90-41

UNITED STATES OF AMERICA,
Plaintiff,

V.

ROBERT KEITH NEELY,
Defendant,

MOTION FOR DISMISSAL PURSUANT TO RULE 16(d)(2) AND BECAUSE OF PROSECUTORIAL MISCONDUCT

COMES NOW, the defendant, Robert Keith Neely, by counsel, and moves the Court for a dismissal with prejudice of the indictment now before the Court for the following reasons.

BACKGROUND

For the past several years, the defendant has continually received information from various individuals indicating that the United States Attorney's Office, Federal Bureau of Investigation, and the Virginia State Police, have vindictively singled him out in a calculated attempt to prosecute him. Various individuals indicated to the defendant that the case agent Jerry Fayed of the FBI, has had, and continues to have a vendetta against the defendant. This information has come through various sources including, but not limited to, Bonita Caswell who, along with a Jerry Dehart, deceased, worked with the Federal Bureau of Investigation and the Virginia State Police in an undercover operation during 1987 and 1988. Ms. Caswell has testified before the Honorable Glen Conrad as late as December 14, 1990, that Fayed has a vendetta against the defendant. Michael Giacolone, the prosecution's chief witness in the indictment now against the defendant, stated to the defendant on or about November 24, 1990, that Jerry Fayed hated the defendant and would do anything to prosecute him. There has been wide spread rumors and allegations that the defendant is somehow involved in a fantasy "conspiracy" of

political corruption in Montgomery County. This is most recently evidenced by Assistant United States Attorney Karen B. Peters letter to Reed Rubin, Esquire, Chief, Narcotics Division, Assistant State's Attorney, Miami, Florida, in a letter dated February 12, 1991. In that letter, Assistant United States Peters states "it was difficult to build a prosecutable case against him as Neely was perceived in his community to be powerful, successful and closely connected with the local circuit Judge and Commonwealth Attorney."

The defendant, by counsel, believes that the government, through the U. S. Attorney's Office, FBI, Virginia State Police and other investigative branches have set out on a flagrant and outrageous course of conduct which has violated the defendant's right to a fair trial, proper representation, and denial of due process by undermining him in his attempt to prepare a proper defense. The defendant believes that a dismissal of the indictment is necessary for the preservation of the integrity of the judicial process. Because of the manner of the prosecution of the defendant that has taken place in this indictment and other investigations there has been a serious threat to the integrity to the judicial process. Therefore, it

would be a proper exercise for the Court of it's supervisory powers to discourage these improper government practices in the future. It is further believed that this conduct is so outrageous that it violates the defendant's due process rights.

The defendant was video taped in a drunken state sharing cocaine with an undercover agent on the night of October 30-31, 1988. Finally, in late 1990, an information for possession of cocaine was brought by the United States Attorney's Office as a result of this encounter. During the first seven (7) days of November, 1989, and prior to the Giacolone, et al, indictment, when the defendant went to the U. S. Attorney's Office on behalf of a subpoenaed client he was advised by AUSA Peters and Fitzgerald that he had a conflict of interest and that he might be charged with an indictment because of "his friend Beverly". AUSA Peters gave further details to the defendant of what was going to be presented to the Grand Jury. Assistant United States Attorney Peters, advised the defendant at that time, that he had a conflict in the representation and that he may very well be indicted. No action was taken against the defendant, although various indictments were brought down on November 8, 1989. In March 1990,

Michael Giacolone pled guilty to various drug charges before this Court. At that time he began cooperating with and giving statements to the government, continuing to do so up to the present date. It was only after Michael Giacolone provided the Government with land transaction documents, which included a partnership agreement with the defendant, public notice of which was recorded in Pulaski County, Virginia, that the United States Attorney's Office notified counsel for the defendant that they now intended to prosecute the defendant for the incident of October 1988 with Beverly Wallace. Counsel for defendant was notified on or about August 13, 1990, at least nine (9) days before Ms. Bassett is alleged to have advised defendant of the same information.

It was represented to the defendant by Michael Giacolone, in the meeting of November 24, 1990, that the Government's soul purpose in the prosecution of that case, was to use a conviction to boot strap it's evidence against the defendant in the indictments now before the Court.

The defendant entered a plea of guilty to possession of cocaine before the Honorable Glen Conrad on October 12, 1990. Various discussions took place between counsel for the

defendant and Assistant United States Attorney Peters concerning sentencing. In those discussions Assistant United States Attorney Peters made various allegations of prior drug use by the defendant. A hearing was held before the Honorable Glen Conrad to discuss out of court hearsay testimony and live witness testimony before the Court concerning prior use. The Honorable Glen Conrad stated to counsel that he would take lightly the consideration of any out of court hearsay statements, but would substantially weigh any live testimony. A list of the proposed prior use incidents was given to the defendant's counsel pursuant to order of Magistrate Conrad. After receiving the alleged incidents of prior use, the defendant was contacted by Michael Giacolone. Giacolone advised the defendant that he had specifically told FBI agent Jerry Fayed that three of the alleged incidents did not happen. Those three included, alleged incidents with a Lori Krizer, James Reagan and Jamel Agemy. Upon hearing these representations by Giacolone, counsel for the defendant requested and received an order by the Honorable Conrad which required the government to provide to the defendant any exculpatory evidence which would indicate that the defendant

did not commit the prior acts and/or any evidence deemed to be exculpatory.

Assistant United States Attorney Peters also advised that Doug and Richard Keith were to testify concerning prior cocaine usage and/or involvement. Only Richard Keith testified. His testimony as proffered could have been extremely damaging to the defendant because it was represented that he stated that he had gone to the defendant's office and supplied the defendant with one ounce of cocaine from Jimmy Pappas as a legal fee. At the hearing Richard Keith said he never went into the defendant's office. Doug Keith was present at the hearing, was called into the Courtroom and then waived out by Assistant United States Attorney Peters. A couple of weeks later, it was learned, through Doug Keith's attorney, that Doug Keith had advised Assistant United States Peters that he knew nothing about the incident. Counsel for Doug Keith agreed to allow the defendant, and counsel, interview Doug Keith concerning these allegations. At this interview, Doug Keith, a felon under the supervision of this Court, was advised by his probation and parole officer, Don Aker, that he would have to appear on December 14, 1990, at the sentencing hearing of

Keith Neely. Doug Keith went to the United States Attorney's Office on the morning of December 14, 1990, where he met Karen Peters, Jerry Fayed and his brother Richard. Upon entering the United States Attorney's Office, he questioned why he was needed. It is Doug Keith's understanding that either Assistant United States Peters or Fayed told him that they wanted him to testify about Richard bringing cocaine to Keith Neely for a fee. Doug Keith stated that he did not know anything about the incident. At that time either Assistant United States Peters or the FBI Agent Fayed placed a piece of paper in front of him and told him that maybe this would help him refresh his memory. The paper contained allegations that Richard and Doug Keith and a girl by the name of Grace went to Keith Neely's Office with cocaine to give to him as a fee and that someone went into Neely's office and gave it to him. After reading this piece of paper, Doug Keith again told them that he knew nothing about this. At that point, according to Doug Keith, Assistant United States Attorney Peters, who became somewhat upset, demanded that he go down to the next floor to the magistrate's courtroom and wait. While outside of the courtroom and during the sentencing phase of defendant Neely,

Doug Keith waited along with several other individuals, which included Max Jenkins and Investigator Denver Stewart of the Montgomery County Sheriff's Department. Doug Keith advised both of these individuals that he did not understand why he was there. Although damaging testimony came from Richard Keith, counsel was never informed that Doug Keith was now presenting evidence in contradiction to his brother's testimony and available to testify to this fact. Assistant United States Attorney Peters violated the order of Magistrate Conrad and has to this date never given this information to counsel for the defendant. (see Attachment 1)

The defendant`s sentencing hearing on the possession of cocaine charge was scheduled for December 14, 1990. Immediately prior the sentencing hearing, Assistant United States Attorney Peters went to Abington for a Grand Jury and obtained the hastily prepared indictment now before the Court. As a matter of fact, this upcoming Abingdon indictment was told to the defendant by Michael Giacolone at their November 24, 1990 meeting. This awareness by the defendant and his counsel shocked AUSA Peters who insisted on knowing the defendant's source when she was contacted by counsel to

arrange a voluntary surrender. It is the defendant's contention that this sloppily drawn indictment was presented solely for the purpose of attempting to influence the Magistrate to sentence the defendant to jail, thereby covertly subverting the terms of the defendant's plea agreement not to request incarceration.

Assistant United State's Attorney Peters advised counsel for defendant that she planned to use testimony of three individuals to demonstrate prior cocaine use. One individual's name was Jeff Kirkland. Kirkland testified concerning several prior incident's of cocaine use by the defendant in the presence of a certain individual by the name of Leigh Hurst. Although Assistant United States Attorney Peters was under a Court Order to divulge to the defendant counsel any knowledge of inconsistencies that might appear to show that the defendant did not commit these prior usages, Assistant United States Attorney Peters failed then to advise counsel for the defendant that she had previously talked to Leigh Hurst on several occasions concerning prior cocaine use by the defendant. It is the understanding of counsel that in response to the Assistant United States Attorney Peters questioning of Hurst that he disavowed any knowledge of

Neely's cocaine use. If correct, Assistant United States Attorney Peters apparently made an independent determination of the credibility of Hurst's statements and failed to comply with the Court Order and advise the defendant, through his counsel, of this discrepancy.

PROSECUTORIAL MISCONDUCT BEFORE THE GRAND JURY

Through the defendant's review of the discovery material provided to him by the United States Government, and through interviews by defendant's counsel with Shirley Bassett, it was discovered by the defendant that Ms. Bassett had been interviewed twice by the FBi prior to the present indictment and at both times had informed the FBI that there had been no agreement whatsoever between Mr. Neely and herself. Ms. Bassett admitted that she voluntarily provided some information to Mr. Neely. She stated that Mr. Neely had never requested any information from her other than asking her at the very last day of the alleged conspiracy that if she hears anything to let him know. She also admittedly denied that she was providing this information to Mr. Neely in exchange for

Mr. Neely providing her with any kind of drugs. This evidence, obviously even to the untrained eye, completely exculpates Mr. Neely from any concept that there was even probable cause to believe that he was involved in a conspiracy as set forth in the indictment handed down by the Abingdon Grand Jury in December of 1990. Ms. Peters refused to present any of this totally exculpatory information to the Grand Jury and instead presented a previously prepared indictment setting forth a conspiracy for the Grand Jury to endorse and sign. Whereas, there has not been a definitive case that has mandated the United States Government should present exculpatory information to a grand jury, the evidence available to the government in this particular matter is quite different from other situations when there is a question as to whether information could possibly be exculpatory. In the instant case there is no question that this information from one of the alleged co-conspirators completely exculpated Mr. Neely from the charge of conspiracy as set forth in the indictment.

It is accepted that the historic role of the Grand Jury has been "to clear the innocent no less than bringing to trial those who may be guilty and to serve as a protective bulwark

standing between the ordinary citizen and an over zealous prosecutor." Prosecutorial Misconduct, Bennett L. Gershman, Page 2-42.2 (10/90 Addendum). See also U. S. v. Dionisio, 410 U.S. 1, 16-17 (1973); Wood v. Georgia, 370 U.S.375 (1962). By presenting this evidence to the Grand Jury would not have placed the prosecutor in a position as to decide whether something was exculpatory and necessitating an adversarial proceeding inside the Grand Jury room, as feared in U.S. v. Mandel, 415 F. Supp. 1033, 1040 (D.Md 1976), rev'd on other grounds, 591 F.2d 1347 (4th Cir. 1979), cert. denied, 445 U.S. 961 (1981). There was no question that this evidence from Shirley Bassett totally exculpated Mr. Neely from involvement in an alleged conspiracy with her.

PRESENT MISCONDUCT AND FAILURE TO COMPLY WITH RULE 16

Since the issuance of the present indictment, the same continuous course of conduct involving suppression of discoverable and exculpatory evidence continues on the part of the Virginia State Police, FBI and/or the United States Attorney's Office. Although the defendant was indicted on

December 7, 1990, the case was originally to be tried on February 13, 1991. The defendant filed formal motions with this Court on December 31, 1990, requesting that the government provide a multitude of discovery including exculpatory Brady material. By order of this Court, the United States Government was directed to provide discovery, including exculpatory Brady information, to the defendant no later than March 1, 1991. Although the case was originally to be tried on February 13, 1991, Assistant United States Attorney Peters requested the Court for an extension from March the 1st, until March the 4th, to comply with the Court's order "to review the files" to make sure all information was provided.

The Assistant United States Attorney, Karen Peters, has not made available the tax returns of Michael Giacolone which she directed to do on February 22, 1990. At the time of the Court hearing, Ms. Peters stated that she had two years of Mr. Giacolone's tax returns and they would be turned over and presented to the defendant. Ms. Peters has also failed to turn over, pursuant to request in discovery and pursuant to request for all exculpatory information, the telephone records of

Michael Giacolone, more specifically being those records tied in with the telephone number of 552-8223. It is defendant's belief that the telephone records of Mr. Giacolone will demonstrate numerous telephone calls made by Mr. Giacolone to a gambling point spread service 900 number. This evidence is obviously exculpatory because it demonstrates where Mr. Giacolone's income came from and directly contradicts the scenario presented by the Government that Mr. Neely should have known that Mr. Giacolone's proceeds must have come from drug trade. The tax records of Michael Giacolone also are exculpatory and should have been made available to the defendant prior to this time. It is the defendant's belief that these tax records will show the alternative sources of income of Mr. Giacolone and also will demonstrate that Mr. Giacolone misrepresented to the United States Government other sources of his income. These records can be used for impeachment purposes and as evidence that Mr. Giacolone's proceeds came from sources other than his alleged drug trade.

Assistant United States Attorney Peters has failed to disclose the following exculpatory evidence to the defendant: Doug Salamon meetings with FBI Agent Fayed, in which it is

believed he denied knowing anything about the alleged notes that were assigned by Michael Giacolone to Robert Keith Neely. This would directly contradict the Government's allegations in discovery that Doug Salomon knew about these notes and that they were signed during July of 1990 and not during July of 1989 as shown on their face. Doug Saloman also provided exculpatory information that was provided to Investigator Fayed concerning the gambling habits of Michael Giacolone. This information is and continues to be extremely important to the defendant's defense and denial of same that this date has severely prejudiced his ability to adequately defend himself before this Court.

Assistant United States Attorney Peters has deliberately deleted the Grand Jury testimony of a Steven Wimmer on page 13-16 and page 18-36 of his Grand Jury testimony. Those deletions are found at page 593 and 594 of the government's disclosure materials. It is the defendant's belief that these deletions include testimony concerning various issues that have been brought up by the Government, both through direct and cross-examination and that the defendant believes the Government will attempt to present at trial of the defendant.

This exculpatory information deals with Mr. Wimmer's drug habits, Mr. Wimmer's involvement in a cocaine transaction involving Michael Giacolone and Jerry Dehart, Mr. Wimmer's illegal gambling ties, and Mr. Wimmer's knowledge and involvement in the "political corruption" issue that has surfaced in this matter. (Refer to Whittaker examinations see page 279 of government's discovery and various allegations and innuendos set forth and created by the Assistant United States Attorney Karen Peters throughout this matter to the present date.)

Assistant United States Attorney Peters has also withheld the testimony given by Steven Wimmer's mistress concerning the illegal gambling of Mr. Wimmer and what we believe to be other information that can be used to impeach Mr. Wimmer. The defendant is under the belief that Mr. Wimmer's witness was granted immunity and testified before the Grand Jury sometime in the past.

Assistant United States Attorney Peters has withheld information received by FBI Agent Fayed from Benny Martin, in which Mr. Martin denies the allegations made by Michael Giacolone that the defendant had informed Benny Martin to

inform Michael Giacolone that he wanted to pay him off for his testimony. (see page 622 and 623 of government's discovery)

Assistant United States Attorney Peters has also deleted statements (see page 612) made by Michael Giacolone containing what the defendant believes to be exculpatory information which can be used by the defendant to impeach testimony of other witnesses and also to be used to cross-examine and challenge the credibility of Michael Giacolone, It is believed that this information regards the alleged exaggeration presented to the Court by Assistant United States Attorney Peters concerning money laundering which she has seen fit to continually raise during pretrial hearings and has set forth in her Bill of Particulars. As such, the information is discoverable under Rule 16 and is discoverable pursuant to the Brady line of cases.

Assistant United States Attorney Peters has deliberately denied the defendant, Robert Keith Neely, exculpatory evidence presented by Dawn Acuff to the Grand Jury on December 13, 1990. (see deletions at page 399 of the Government's discovery) It is believed that Ms. Acuff, in response to Ms. Peter's questioning, stated that Michael

Giacolone had never given her a Cararra glass case with marijuana in it (see Attachment II). Michael Giacolone said that he did so to be given to Mr. Neely for the purposes of presenting said marijuana to Shirley Bassett. This is in direct contradiction to the information presented by Michael Giacolone, both to Investigator Fayed and to the Grand Jury, that he once gave Ms. Acuff marijuana in a Cararra glass case that was to be given to Ms. Bassett. Also, Ms. Peters purposely deleted from Ms. Acuff's Grand Jury testimony exculpatory evidence and impeachment evidence that could have been used against Michael Giacolone. It is believed Ms. Acuff stated to the Grand Jury her general opinion concerning the truthfulness and veracity of Michael Giacolone and Donald Kimbler.

Assistant United States Attorney Peters has not presented any of the FBI reports or Grand Jury testimony provided by a Jerry Dehart when he purchased an amount of cocaine from a Steven Wimmer. It is believed said purchase of cocaine was made when Michael Giacolone was present or in the vicinity. This information is obviously exculpatory and has impeachment value for the defendant.

Assistant United States Attorney Peters has not disclosed to the defendant transcripts of any tapes prepared from a wire recorder that was being worn by a Kathy Weeks when she approached the defendant, Robert Keith Neely, with a Jerry Whittaker.

Assistant United States Attorney Peters deliberately redacted and removed portions of the Kimbler testimony that is either discoverable under Rule 16 or exculpatory and discoverable pursuant to Brady. (see page 259 of Government's Discovery materials)

FURTHER COURSES OF PROSECUTORIAL MISCONDUCT

The defendant further alleges that Assistant United States Attorney Peters, her FBI agent Jerry Fayed and other investigating agents of the State Police and Federal Government has proceeded against Robert Keith Neely under this indictment in a vindictive nature that is not Constitutionally permissible. "Essentially this doctrine of prosecutorial misconduct seeks to accomodate the competing interest of the prosecutor in deciding whether to prosecute and what charges to file with the freedom of the defendant to exercise constitutional and statutory rights without fear of retaliation. It

requires an examination of the prosecutor's motive and conduct, in the context of a variety of procedural settings, to determine whether {s}he abused her charging discretion by impermissibly retaliating against the defendant for exercising his legal right." Prosecutorial Misconduct, Bennett L. Gershman, Page 4-28, Section 4.4. Vindictive Prosecution (10/90 Supplement) In our instant case, besides all of the conduct previously set forth in this motion, there has been further conduct exhibited by the Government that leads one to believe that this prosecution has been conducted in a solely vindictive manner.

On February 22, 1991, just prior to the defendant's hearing on his Motion to Dismiss, Assistant United States Attorney Peters was handing out in the Courtroom her Motion to revoke Mr. Neely's bond to the press.

This was done even before the papers were personally delivered to the defendant's counsel who was present in the Courthouse all day and was in the Courtroom. It is in the defendant's contention that this distribution of the Government's motion was done solely for the purposes of creating headlines in the newspaper that would serve to

prejudice any potential jurors that might come before this Court to serve on the jury panel in the trial of Mr. Neely. It is also the defendant's contention that this distribution of the motion to the press was done to obfuscate and defuse the very important issues that were to be heard on February 22, 1991. This action by Ms. Peters, when considered with the hurried indictment issued, by the Abingdon Grand Jury (which the defendant contends was done to influence the Magistrate in his sentencing of Mr. Neely several days thereafter) demonstrates this course of vindictive conduct. The attitude of Assistant United States Attorney Peters is also made quite evident in many of the statements she has made through her pleadings, bill of particulars, and in open Court. She has on numerous occasions set forth or made statements about the dishonestly of attorneys who are only doing what is obviously acceptable by the criminal defense bar (i.e. sweeping their offices for electronic bugs or advising their clients that they have the right to do so and also advising their clients to remain silent as they have their privilege pursuant to the Fifth Amendment of the Constitution). A review of Ms. Peter's letter to prosecutors in Florida in which she made slanderous, false and misleading

statements to a Reed Rubin, further evidences her vindictiveness. More evidence of Ms. Peters and her agent's vindictiveness is demonstrated by her editorializing that she has set forth her Bill of Particulars. A page by page, paragraph by paragraph critique is dealt with in detail in the defendant's motion to dismiss. Some evidence of Ms. Peters vindictiveness is shown by her statement found on page three of the Bill of Particulars. Ms. Peters states that "moreover Neely has been laundering, borrowing, or essentially stealing Giacolone's drug money, being aware of it's source". The term "laundering" is once again used by Ms. Peter's despite the Court's specific Order that there is to be no reference to the issue of laundering. Furthermore, we now see Ms. Peters accusing Mr. Neely of stealing Mr. Giacolone's drug money. A new allegation which is absolutely and totally unsupported by any of the information provided to defendant's counsel pursuant to discovery. Furthermore, she makes a blanket statement that Mr. Neely was aware of the source of this money when in fact the information provided to defense counsel is that Mr. Neely was not aware of it's source but only was felt that he should have been aware of it's source because of Mr. Giacolone's

sudden display of wealth. Once again, Ms. Peters has editorialized in her attempt to influence, (I don't know who), someone with her perjorative formulations. Ms. Peters continues on the path of misleading the Court (page 14) where she makes reference to Kimber having been told by Mr. Neely that Jerry Dehart was an informant and Grand Jury witness. She was implying that the defendant received this information through the Grand Jury, when in fact Ms. Peters was quite aware that Mr. Neely had received this information from Bonita Caswell. Ms. Peters was present at a trial in Pulaski County, Virginia, when Ms. Caswell testified that she was the one that informed Mr. Neely of Mr. Dehart's involvement with the Government. Ms. Peters also once again editorializes by stating that a Jimmy Pappas and a Keith Snyder were friends of Mr. Neely when in fact there is absolutely no evidence to establish a friendship between Jimmy Pappas, Keith Snyder, and Mr. Neely. Other conduct that is indicative of Ms. Peters vindictive nature toward the defendant and her misleading statements toward the Court surface when one understands that she has not disclosed to the Court that it was her and her office that initially leaked to Mr. Neely in the early part of

November 1989, and prior to the Giacolone, et al, indictment, that he had a conflict of interest because they were going to be presenting information to the Grand Jury concerning his involvement with a Beverly Wallace and possible cocaine distribution charge. This is the exact information that Ms. Peters accuses Ms. Bassett of disclosing to Mr. Neely more than a week later. In fact, it was Ms. Peters who made the alleged initial 6 (e) violation. Ms. Peters has also not disclosed to the Court or in discovery or by way of exculpatory material to the defendant that it was her that informed counsel for the defendant on or about August 13, 1990, that she was going to by tying up all of the loose ends in the Giacolone/Agemy investigation and that Mr. Neely was going to be indicted for cocaine distribution based on Beverly Wallace's testimony. This disclosure to counsel for the defendant was at least nine (9) days prior to the alleged disclosure by Ms. Bassett to Mr. Neely of the same information. It seems as if Ms. Peters believes that if the disclosures by Ms. Bassett to Mr. Neely were 6 (e) violations then why weren't the same disclosures made by her prior to the disclosures made by Ms. Bassett also 6 (e) violations. Once again, it is the defendant's contention

that this goes to establish Ms. Peters vindictive prosecution in this matter.

CONCLUSION

In light of all of the above, and upon consideration of the Government's Bill of Particulars, and upon consideration of the defendant's renewed Motion to Dismiss, it becomes quite clear that the course of conduct of the United States Attorney's Office and the investigating agencies involved with the instant case have conducted themselves in a deliberate fashion that can only be labeled misconduct. The Government conduct, when taken in it's entirely, exhibits a deliberate course of outrageous conduct to such a degree that it violates Mr. Neely's due process rights, the ability for him to present an adequate defense on his behalf, and has subjected him to substantial financial losses and slanderous innuendos created both in open Court, through pleadings, and through communications that have been discovered by the defendant. This conduct should shock the conscious of the Court and should convince the Court that this kind of conduct must be deterred in the future. The Court has authority through it's general supervisory powers and through Rule 16 (d) (2) to provide the appropriate

remedy to discourage any future continuance of this outrageous Government conduct. Serious prosecutorial misconduct may so pollute a criminal prosecution as to require dismissal of the indictment. (see U.S. v. Crow Dog, 532 F.2d 1182, stay denied, 426 U. S. 917, certiorari denied, 430 U.S. 929, (C.A. Iowa 1970). Whereas, there is no individual act that would shock the conscious of the Court, when taken in it's entirely it demonstrates a course of conduct that is outrageous and as such violates due process. U. S. v. Wiley, 794 F.2d 514 (9th Cir. 1986). Ms. Peters is wearing the title of Assistant United States Attorney and therefore must adhere to the highest standards of fairness and justice. U. S. v. Leslie, 759 F2d. 366, dissenting opinion 759 F.2d 381, rehearing granted 761 F.2d 195, on rehearing 783 F.2d 541, cert. granted and vacated, 479 U.S. 1074, on remand 813 F.2d 658; U.S. Rodriguez, 765 F.2d 1546 (11th Cir. 1985); U. S. v. Johnson, 767 F.2d 1259 (8th Cir. 1985) As in the American Rules of Professional Conduct Rule 3.4 (e), the prosecutor does not represent an entity whose interest include winning at all costs; a prosecutor's client is society, which seeks justice and not victory. see U. S. v. Doe, 860 F.2d 488, cert. den. Crespo-

Hettera v. U. S. 109 S. Ct. 1961, (1st Cir. 1988); U. S. v. Daniel, 770 F.2d 1111, (C.A.D.C 1985); McDonald v. Doe, 650 F. Supp. 858 (S.D.N.Y. 1986).

Wherefore, the defendant, Robert Keith Neely, by counsel, moves the Court to dismiss the indictment issued against him based on prosecutorial misconduct and the general supervisory powers of this Court and under the general powers granted to it pursuant to Rule 16 (d) (2) and for any other relief permitted by Rule 16 and other rules of Court.

Respectfully submitted,

ROBERT KEITH NEELY

By: /s/ Edward M. Jasie
OF COUNSEL

Edward M. Jasie
Counsel for Defendant
Post Office Box 174
Blacksburg, Virginia 24063

CERTIFICATE OF MAILING

I, Edward M. Jasie, do hereby certify that I mailed/delivered a true copy of the foregoing to Karen B. Peters, Assistant United States Attorney, Poff Federal Building, Post Office Box 1709, Roanoke, VA 24008-1709, on this 13th day of March, 1991.

/S/ Edward M. Jasie, Esq.

....

defendant's motion to dismiss all three counts on prosecutorial misconduct, based simply on the failure to present to the grand jury evidence of Shirley Bassett.

The testimony that I have read and the statements that I have read, and I'll preface it this way, I obviously haven't read all the statements or all the testimony, but if I understand the government's position, the connecting link which it is relying heavily on to tie the defendant to some conspiratorial or aiding and abetting conduct is the testimony of Mr. Kimbler.

I have read his statement, and it does, in a sense, give the government some comfort, but if I understand his statement, the statements of Mr. Neely that he would testify to took place in 1986 or '87, some perhaps two to three years prior to the beginning of this conspiracy or the allegations, that is.

That being the case, I think that Ms. Bassett's testimony to the effect that she furnished the information to Mr. Neely sua sponte, as it were, on her own ticket, in no way implicates Mr. Neely as having encouraged or aided or conspired to obtain that information.

There is a lot of smoke and fire in the grand jury testimony (and I won't get into that because of what we've said in the earlier hearing), but not with regard to the charges here laid.

That has very strongly influenced my ruling; not the smoke and fire but what I simply said about the -- what I perceive to be the evidentiary weakness of the government's case.

And as I said earlier, I realize that on a simple motion to dismiss for lack of proper allegations in the indictment, technically I had no way to go except to dismiss those motions as to -- the motion as to 1 and 2.

But it seems to me that the grand jury should have heard from Ms. Bassett.

And I realize that that is in many instances a discretionary call with the prosecutor who's handling the grand jury, and many of the courts say that it is not necessary for the prosecutor to present all evidence, even exculpatory evidence, to the grand jury.

The best discussion that I saw of that issue was Judge Murray's opinion in the Mandell case, and he discusses it rather

fully.

I think in most all the cases and the discussions I've read though there was some real substantial argument as to the exculpatory nature of the testimony which would have been presented to the grand jury.

As to Ms. Bassett there is no reasonable argument that her testimony would not be exculpatory.

(2)

No. 92-936

FILED
DEC 21 1992
OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1992

ROBERT KEITH NEELY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
Solicitor General
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Washington, D.C. 20530
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BEST AVAILABLE COPY

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ROBERT KEITH NEELY, PETITIONER

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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1. Petitioner was indicted by a grand jury sitting in the United States District Court for the Western District of Virginia. He was charged with conspiracy to defraud the United States by interfering with grand jury secrecy, in violation of 18 U.S.C. 371; obstruction of justice, in violation of 18 U.S.C. 1503; and criminal contempt, in violation of 18 U.S.C. 401(3).

Petitioner moved to dismiss the indictment on the ground that the government failed to present exculpatory evidence to the grand jury. Specifically, he alleged that the government did not present to the grand jury a co-conspirator's pretrial statement in which she stated that petitioner did not solicit the secret grand jury material from her. On April 3, 1991, the district court dis-

missed the indictment on the ground that the government had failed to present the co-conspirator's exculpatory evidence to the grand jury and that the grand jury would not have returned an indictment if it had been properly instructed as to the significance of the co-conspirator's evidence. Pet. App. 10-12.

The court of appeals reversed. Pet. App. 1-4. The court ruled that an indictment may not dismissed on the ground that it was not supported by adequate or competent evidence. Relying on this Court's recent decision in *United States* v. *Williams*, 112 S. Ct. 1735 (1992), the court further ruled that an otherwise valid indictment may not be dismissed on the ground that the prosecutor failed to present allegedly exculpatory evidence to the grand jury. Pet. App. 3-4.

2. Petitioner contends (Pet. 9-12) that the prosecutor improperly failed to present exculpatory evidence to the grand jury. Whatever the merits of petitioner's contention, it is not ripe for review by this Court. The court of appeals' decision places petitioner in precisely the same position he would have occupied if the district court had denied his motion to dismiss. If petitioner is acquitted following a trial on the merits, his contention will be moot. If, on the other hand, petitioner is convicted and his conviction is affirmed on appeal, he will then be able to present his contention to this Court, together with any other claims he may have, in a petition for a writ of certiorari seeking review of a final judgment against him. Accordingly, review by this Court of the court of appeals' decision would be premature at this time.*

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* Because this case is interlocutory, we are not responding on the merits to the question presented by the petition. We will file a response on the merits if the Court requests.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

KENNETH W. STARR
Solicitor General

DECEMBER 1992

Supreme Court, U.S.
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FEB 1 1993
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No. 92-936

IN THE SUPREME COURT
OF THE UNITED STATES
OCTOBER TERM, 1992

ROBERT KEITH NEELY,
Petitioner.
v.
UNITED STATES OF AMERICA
Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE FOURTH CIRCUIT
COURT OF APPEALS

REPLY TO BRIEF IN OPPOSITION

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QUESTION PRESENTED

A. WHETHER A DISTRICT COURT MAY EXERCISE IT'S SUPERVISORY POWER TO DISMISS AN INDICTMENT BECAUSE OF MISCONDUCT BEFORE A JURY WHERE THE MISCONDUCT AMOUNTS TO A VIOLATION OF SPECIFIC RULES ENACTED BY CONGRESS TO ENSURE THE INTEGRITY OF THE GRAND JURY'S FUNCTION AND WHERE A WITNESS CALLED BY THE GOVERNMENT HAS WILFULLY FAILED TO STATE MATERIAL FACTS WHEN CALLED UPON TO ANSWER?

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IN THE SUPREME COURT
OF THE UNITED STATES
OCTOBER TERM, 1992

ROBERT KEITH NEELY,
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v.
UNITED STATES OF AMERICA
Respondent.

REPLY TO BRIEF IN OPPOSITION

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit, is an unpublished opinion dated June 8, 1992. [See Pet. App., Appendix 1.]

JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C., Section 1254(1).

STATUTES INVOLVED

18 U.S.C. 1622 Subordination of perjury, and 18 U.S.C. 1623 False declarations.

STATEMENT OF THE CASE

Petitioner adopts his Statement of the Case previously filed, but wishes to augment it because Respondent's brief misapprehends the central issue.

To characterize this as a case about the failure to present exculpatory evidence is error. This case concerns grand jury perjury. The trial judge recognized that there would not have been an indictment if the prosecution had presented the truth to the grand jury. This led to the dismissal.

The grand jury was investigating the acquisition of grand jury information by Mr. Neely from Court Reporter Bassett. Bassett was interviewed by federal agents. That interview was memorialized in a written report.

> In the grand jury, the prosecutor asked Agent Fayed:
> "Q. Can you tell us what the agents found out by interviewing Ms. Bassett and when that happened?"
> [Pet. App. 31]

He said that Ms. Bassett was interviewed on October 31, 1990. He then read the report to the grand jury. The agent read the report almost verbatim from "... she'd known Keith Neely for approximately ten years..." to "...after she received this information from Cotton..." [Pet. App. 31-34]. At this point, he misled the grand jury into believing that that was "basically" it. That was not "basically a summary of it." [Pet. App. 34].

Comparing this testimony to the report set out in Pet. App. 21-25, makes it clear beyond peradventure that the agent deliberately misled the grand jury. He deliberately and willfully omitted telling the grand jury the following:

> "BASSETT indicated that NEELY never solicited information from her, and she furnished the information to NEELY because of their long-standing relationship.
>
> BASSETT specifically denied that NEELY had ever given her marijuana, or anything else, in exchange for the information concerning FGJ proceedings." [Pet. App. 25] (emphasis added)

The omitted portion was the gravamen of "...what the agent

found out by interviewing Ms. Bassett...". The answer, as given, deliberately deceived the grand jury on whether or not Mr. Neely had obtained information by bribery or other undue influence. The truth is that Bassett had offered the grand jury information unasked. As the trial court recognized, had the grand jury known the truth, there would have been no indictment. The prosecutor knew the truth. The witness knew the truth. The prosecutor asked the witness a question that should have elicited the truth, i.e., when Bassett was interviewed, she told the agent that she had given the information on her own without request or influence. Misleading the grand jury by a deceptive response to such a clear question is perjury.

REASONS FOR GRANTING THE WRIT

United States v. Williams, 112 S.Ct. 1735, (1992), recognized that Court's supervisory power can and should be exercised to improve the truth finding process and to prevent parties from reaping the benefit of or incurring harm from violations of substantive or procedural rules imposed by the Constitution and laws. Id. 112 U.S. 1735, at 1741. This Court

also recognized that Bank of Novia Scotia v. United States, 487 U.S. 250 (1988) made it clear that "...the supervisory power can be used to dismiss an indictment because of misconduct before the grand jury at least where that misconduct amounts to a violation of one of those 'few clear rules which were carefully drafted and approved by this Court and by Congress to insure the integrity of the grand jury function..." (emphasis added.) Id. at 376 citing United States v. Mechanik, 475, U.S. 66 74 (1986) (O'Connor, J. concurring in judgment.)

This case is precisely that category of case acknowledged in Williams, supra. The trial court recognized that the indictment was obtained in violation of a clearly promulgated rule and dismissed it.

Perjury is prohibited by 18 U.S.C. Section 1623. Subornation of perjury before a grand jury is prohibited by 18 U.S. C. Section 1622.

When a grand jury witness gives a false answer, it need not mislead. All that is necessary is that it be "capable" of influencing the tribunal. United States v. Abrams, 568 F.2d 411 (5th Cir. 1978), cert. denied (U.S.) 57 L.ed. 2d 1133, 98 S.Ct. 3089. In the

case presented here, the answer was "capable" of influencing and actually influenced them. Grand jury perjury, is a clear violation of a recognized rule. United States v. Friedhaber, 856 F.2d 640 (4th Cir. 1988).

The federal agent was asked what had been learned from the interview. The question was clear; the answer misleading. It did not say that the agent had learned from the interview that Neely had done nothing to obtain the grand jury information. She gave it to him on her own initiative. This question and answer was as much perjury as the question and answer in United States v. Beitling, 545 F.2d 1106, 1111 (8th Cir. 1976). [clear question, misleading answer, conviction sustained despite a long response which was somewhat more explanatory].

The prosecution cannot allow perjurious statements to go uncorrected. Napue v. Illinois, 360 U.S. 264, 269, (1959). When a prosecutor knows the truth and allows a misleading answer without correction, that violates 18 U.S.C. Section 1622.

This Court has long recognized, as Mr. Justice Scalia said in Williams, supra, that Courts have the authority to dismiss indictments obtained in violation of clearly existing rules or laws.

This indictment was obtained in violation of such rules and laws. The brief in opposition is in error when it suggests that Mr. Neely must go through the expense, rigors, and anxiety of a trial, possible conviction and incarceration pending appeal, and then, some years down the road be vindicated after he has lost everything. The trial court should be sustained summarily or this Court should grant this Petition, hear this case, and make it quite clear that prosecutors cannot obtain indictments by violating the rules and law as occurred in this case.

CONCLUSION

Our system cannot operate with a double standard. An answer which misleads the grand jury about the truth is perjury. Indictments resting on such a foundation must be dismissed. We have to live up to our principles if we are to be a society ruled by law, not men.

Respectfully submitted,

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